FILE COPY

Office-Supreme Court, U.S.
FILED
SEP 16 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960

No. 167

UNION RURAL ELECTRIC ASSOCIATION, INC.,
Petitioner,

v.

PUBLIC SERVICE COMPANY OF COLORADO; THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; RALPH C. HORTON, JOHN P. THOMPSON, and JOSEPH F. NIGRO, members of said Commission; and COLORADO CENTRAL POWER COMPANY;
Respondents.

PETITIONER'S REPLY BRIEF TO BRIEFS IN OPPOSITION TO APPLICATION FOR CERTIORARI

MORRISON SHAFROTH
Attorney for Petitioner
730 Equitable Building
Denver 2, Colorado

INDEX

ARGUMENT

		Page
1.	The Federal Questions were properly raised to give this Court jurisdiction	1
2.	The State decision is final in fixing the authority of the PUC	2
3.	Corrections of some statements found in opposition briefs	3
Appendix A.	The Certificate from the Supreme Court of Colorado	5
Appendix B.	Colorado Statute, 115-5-1 CRS-1953	8

CITATIONS

Cases:

Consolidated Co. v. Norfolk Co., 228 U. S. 596	2
Herndon v. Georgia, 295 U. S. 441	2

Statute:

Colorado, 115-5-1, CRS-1953	8

IN THE

Supreme Court of the United States

October Term, 1960

No. 167

UNION RURAL ELECTRIC ASSOCIATION, INC.,

Petitioner,

v.

PUBLIC SERVICE COMPANY OF COLORADO; THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; RALPH C. HORTON, JOHN P. THOMPSON, and JOSEPH F. NIGRO, members of said Commission; and COLORADO CENTRAL POWER COMPANY;

Respondents.

PETITIONER'S REPLY BRIEF TO BRIEFS IN OPPOSITION TO APPLICATION FOR CERTIORARI

ARGUMENT

1. THE FEDERAL QUESTIONS WERE PROPERLY RAISED TO GIVE THIS COURT JURISDICTION

The Supreme Court of Colorado has issued its certificate concerning the existence of federal questions. Such certificate is set forth for convenience as Appendix A hereto.

It is not too late to raise federal questions by a petition for rehearing, if that petition presented the first opportunity for raising the questions and if the State court

actually entertained such questions and determined them. *Herndon v. Georgia*, 295 U. S. 441. The certificate from the court herein recites that the federal questions arose for the first time upon publication of the opinion of the State court. The certificate also shows that the questions were presented by the petition for rehearing, were considered, and were decided. This is sufficient. *Consolidated Co. v. Norfolk Co.*, 228 U. S. 596.

The fundamental attack by Public Service upon the decision of the PUC was that there had been no showing to support the grant of a certificate to Union. But the State Supreme Court did not hold that the certificate was improper for want of proof of public convenience and necessity, as Public Service urged. Instead, it affirmed and approved the granting of a certificate. Then the State court did something not suggested to it by any party and therein arose the federal questions for the first time.

The State court said that Union was a public utility but that it did not have the rights given by the Colorado statute to such utilities. The Colorado Statute (115-5-1, see Appendix B herein) in effect gives every public utility protection against the encroachment of another public utility into the territory of the first. This is the anti-duplication policy of Colorado.

But the State Supreme Court in effect stated that Public Service and Colorado Central had predominant rights to build lines wherever they might wish, without compliance with the Colorado statute, and that Union could never serve a new customer. No such remarkable decision, at complete variance with legislative provisions and policy, could be reasonably anticipated.

2. THE STATE DECISION IS FINAL IN FIXING THE AUTHORITY OF THE PUC.

The substance of the State court decision is in the last four paragraphs of the opinion (Application pp. 68a-69a.)

PUC is told that it cannot deprive nor curtail Public Service and Colorado Central in the exercise of their rights to build anywhere irrespective of Union's lines and service. It is this that is directly contrary to the Colorado Statute and to the whole theory of regulation.

The only exception to this is that through some future and new application to the PUC and under proof in a new hearing there might arise a case where Union could be allowed to serve some person it was not serving in 1957. This in no sense affects the finality of the determinations that have been made by the State Supreme Court.

3. CORRECTIONS OF SOME STATEMENTS FOUND IN OPPOSITION BRIEFS.

It is not petitioner's basic complaint herein that "it is constitutionally entitled to be treated as if it had been so certificated as of 1940." It is petitioner's contention that to declare it a public utility in 1957 but to then say it had no rights as a public utility under the Colorado law was a denial of due process and the taking of its property.

It is incorrect to state that the "only restriction imposed by the Supreme Court of Colorado is on petitioner's right to construct future extensions." The State court decision limits petitioner to service to customers (persons) existing in 1957, no matter who it may be serving now and no matter what changes occurred after 1957, or may occur hereafter, in occupancy of places served in 1957.

It is stated in one of the briefs in opposition that during the period 1940-1955 petitioner "resisted each and every attempt of the Colorado Public Utilities Commission to subject it to regulation as a public utility." (Public Service, p. 3). There is nothing in the decision of the PUC to substantiate this broad statement. There are only statements about the various proceedings that were brought before the

PUC and later dismissed. The PUC never made any decision or order in that period that was directed against Union or suggested its regulation.

MORRISON SHAFROTH
Attorney for Petitioner
730 Equitable Building
Denver 2, Colorado

September, 1960

APPENDIX A

CERTIFICATE AS TO EXISTENCE OF FEDERAL QUESTIONS

IN THE
SUPREME COURT OF THE STATE OF COLORADO

No. 18698

PUBLIC SERVICE COMPANY OF COLORADO, a Colorado corporation,
Plaintiff in Error,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, and RALPH C. HORTON, JOHN P. THOMPSON and JOSEPH F. NIGRO, the individual members of said Commission, UNION RURAL ELECTRIC ASSOCIATION, INC., a corporation, and COLORADO CENTRAL POWER COMPANY, a corporation,
Defendants in Error.

Error to the District Court of the City and County of Denver
Honorable Robert W. Steele, Judge

CERTIFICATE OF EXISTENCE AND DECISION OF FEDERAL QUESTION

On motion of Union Rural Electric Association, Inc., one of the defendants in error, this Court orders it to be certified and made a part of the judgment heretofore rendered and made herein, that in the prosecution of error from the

District Court of the City and County of Denver the following matters existed in connection with the presentation of a Federal Question:

1. There was no mention of a Federal Question in the briefs of the parties nor in oral argument presented by the parties before this Court.

2. The first suggestion of a Federal Question was during the discussions of the Justices of this Court as to the judgment to be rendered. The possibility that the judgment as proposed by the majority of the Court would contravene due process of law was raised by some of the Justices of this Court and the matter received consideration, but such objections were overruled by the majority of the Court.

3. The existence of Federal Questions was pointed out in the minority opinion of this Court.

4. Upon publication of the opinions of this Court a Federal Question arose for the first time.

5. The Petition for a Rehearing filed by Union Rural Electric Association, Inc., raised and relied upon the existence of Federal Questions and set forth that it was the claim of such petitioner that the judgment of this Court violated the rights of such petitioner as guaranteed by the Constitution of the United States.

6. The said Petition for Rehearing was carefully considered by this Court, the contentions relative to the denial of due process and taking of property and contract rights without due process, as urged by Union Rural Electric Association, Inc., were the subject of discussion among the Justices of this Court, and the denial of the petition for

rehearing was a determination that the Federal Questions raised should be and were decided against said petitioner.

Dated July 14, 1960.

THE SUPREME COURT OF THE
STATE OF COLORADO

By Leonard B. Sutton,
Its Chief Justice

APPENDIX B

THE STATUTE OF COLORADO APPLICABLE TO EXTENSIONS BY ALL PUBLIC UTILITIES

115-5-1. New Construction—extension. No public utility shall begin the construction of a new facility, plant or system, or of any extension of its facility, plant or system, without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction. Sections 115-5-1 to 115-5-4 shall not be construed to require any corporation to secure such certificate for an extension within any city and county or city or town within which it shall have theretofore lawfully commenced operations, or for an extension into territory, either within or without a city and county or city or town, contiguous to its facility, or line, plant or system, and not theretofore served by a public utility of like character, or for an extension within or to territory already served by it, necessary in the ordinary course of its business. If any such public utility, in constructing or extending its line, plant or system shall interfere or be about to interfere with the operation of the line, plant or system of any other public utility already constructed, the commission, on complaint of the public utility claiming to be injuriously affected, after hearing, may make such order prohibiting such construction or extensions, or prescribing such terms and conditions for the location of the lines, plants or systems affected as to it may seem just and reasonable.